FILE COPY

Office - Supreme Court, U.
FILED
FEB 21 1939
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1938

No. 481

ROCHESTER TELEPHONE CORPORATION,
Appellant,

v.

THE UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,
Appellees.

APPELLANT'S BRIEF

T. CARL NIXON,
Counsel for Appellant.

JUSTIN J. DOYLE,
Of Counsel.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions, Statute and Order Involved	2
Statement	3
Procedure before Commission	3
Facts	5
Errors to Be Urged	13
Summary of Argument	15
Argument:	
I. The Federal Communications Commission, in making the Order complained of, exceeded the powers delegated to it by the Act, and the District Court erred in refusing to reach an independent decision on the issue of exemption	16
II. The Commission, in making the Order complained of, departed from applicable rules of law, and its arbitrary and capricious findings were not only not based on substantial evidence but were made in the face of overwhelming such evidence to the contrary	20

PAGE

A. Appellant is "legally" controlled by the voting trustees who vote two-thirds of its common stock and not by New York Telephone Company and there is no substantial evidence in the record to the contrary 21

B. Appellant is "actually" controlled by the voting trustees aforesaid and not by New York Telephone Company, and there is no substantial evidence in the record to the contrary 33

Résumé of Point II 44

Argument:

III. The District Court should have enjoined the Order of the Commission and the Decree below, should, therefore, be reversed 45

TABLE OF CASES AND STATUTES CITED

CASES: PAGE

American Telephone & Telegraph Co. et al. v. U. S. 299 U. S. 232; affirming 14 Fed. Supp. 121 2

United States v. Idaho, 298 U. S. 105 17

Shields v. Utah Railroad Company, 305 U. S. —, U. S. S. C. L. ed. Adv. Opinions, Vol. 83–No. 4, page 170 18

St. Joseph Stock Yards Co. v. United States, 298 U. S. 38 ..... 19, 45

Mfgrs. Ry. Co. v. United States, 246 U. S. 457 .. 19

Interstate Commerce Commission v. Ill. Central Ry. Co., 215 U. S. 452 ..... 19, 44

Interstate Commerce Commission v. Union Pacific Ry., 222 U. S. 541 ..... 19, 44

Florida v. United States, 292 U. S. 1 19

Fletcher Cyclopedia Corporations (permanent Ed. Vol. 5, Sec. 2096, p. 336) 23

Penn. RR. Co. v. Commonwealth, 7 Atl. 368 23

U. S. v. Northern Securities Co., 120 Fed. Rep. 721 ..... 23, 24

Pearsall v. Great Northern Ry., 161 U. S. 646 .. 24

First National Bank v. Waterloo and Fire Proof Storage Building Co., 199 Iowa 1285 24

Fletcher Cyclopedia Corporations, Vol. 13, Sec. 5762, p. 55 25

Farmers L. & T. Co. v. N. Y. & N. R. Co., 150 N. Y. 410 25

In re Purchase of Stock of C. A. & R. I. Ry. v. Rock Island, 72 I. C. C. 273 25

CASES: PAGE

In the Matter of the Application of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for authority to acquire control of the Peoria & Eastern Railway, 71 I. C. C. 747 26

Nickelplate, Erie & Western Contract, 72 I. C. C. 151 26

Federal Trade Comm. v. Western Meat Co., 272 U. S. 554 30

Texas and P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197 30

Holy Trinity Church v. United States, 143 U. S. 457 30

Berle and Means, The Modern Corporation and Private Property (1932) Chap. V, pages 69–118 34

In the Matter of Jamestown Telephone Corporation, 4 F. C. C. 326 (1937) 38

Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88 45

STATUTES:

Federal Communications Act of 1934, Act of June 19, 1934, Chap. 652, 48 Stat. at L. 1064, Chap. 652, 47 U. S. C. A., Sec. 151 2

Urgent Deficiencies Act of October 22, 1913, 38 Stat. at L. 219, 220, Chap. 32, 28 U. S. C. A. Secs. 47, 47 (a) 2

Supreme Court of the United States

OCTOBER TERM, 1938

No. 481

ROCHESTER TELEPHONE CORPORATION;
Appellant,

v.

THE UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,
Appellees.

APPELLANT'S BRIEF

OPINION BELOW

The District Court of three Judges for the Western District of New York delivered an opinion which is reported in 23 Fed. Supp. 634 (R. 431).

JURISDICTION

This is an appeal from a final decree of the United States District Court for the Western District of New York, entered October 21, 1938, denying appellant's petition for an injunction against the operation of an Order of the Federal Communications Commission dated November 18, 1936 (R. 430).

Section 402 (a) of the Communications Act of 1934

(47 U. S. C. A., Sec. 402 (a)) makes the provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the setting aside of orders of the Interstate Commerce Commission, applicable to suits to enjoin orders of the Federal Communications Commission. Accordingly, the appeal from said decree of the specially constituted District Court below lies directly to this Court (48 Stat. at L. 1064, 1093, Chap. 652, Sec. 402 (a), 47 U. S. C. A. Sec. 402 (a); 38 Stat. at L. 219, 220, Chap. 32, 28 U. S. C. A., Secs. 47, 47 (a)). *American Telephone & Telegraph Co., et al. v. U. S.*, 299 U. S. 232, affirming 14 Fed. Supp. 121.

QUESTIONS, STATUTE AND ORDER INVOLVED

This case presents the questions of the effect of a determination by the Federal Communications Commission for the purposes of the Federal Communications Act of 1934, that the appellant is subject generally to the provisions of said Act, and of the scope of judicial review of that determination.

The Act involved is the Federal Communications Act of 1934 (Act of June 19, 1934, Chap. 652, 48 Stat. at L. 1064, Chap. 652, 47 U. S. C. A., Sec. 151). Particularly there is involved Section 2 (b) (2) of said Act which provides as follows:

> "Subject to the provisions of section 301; nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to. . . . (2) Any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling

> or controlled by, or under direct or indirect common control with, such carrier; except that sections 201 to 205 of this chapter, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clause (2)."

(The provisions of section 301 do not apply to a telephone carrier. Appellant concedes that said sections 201 to 205 are applicable to it.)

The Order involved was made by the Commission on November 18, 1936 and reads as follows:

> "Pursuant to the Report of the Commission issued by the Telephone Division herein, it is hereby ordered that the Rochester Telephone Corporation, as a wire telephone carrier, be, and the same is hereby, classified as subject to all common carrier provisions of the Communications Act of 1934, and, therefore, subject to all orders of the Telephone Division applicable to wire telephone carriers whose annual gross operating income exceeds $50,000" (R. 430).

(This Order constitutes a final determination by the Commission that appellant is generally subject to its jurisdiction and directs it to comply with certain orders of its Telephone Division which had theretofore been served upon appellant, to wit, Orders numbers 1, 2, 3, 5, 6A and 9 (R. 20–30)).

STATEMENT

Procedure before Commission: On October 9, 1935, the Commission issued an Order, and on November 13, 1935, issued an amendment thereto requiring appellant

to show cause on a certain day why it should not be required to file responses to its general Orders numbers 1, 2, 3, 5, 6, 6A and 9 (R. 20–30). Appellant filed its verified answer to said Order alleging, among other things, that it is a corporation existing under and by virtue of the Laws of the State of New York; that it is engaged in interstate or foreign communication solely through physical connection with the facilities of the New York Telephone Company; that said New York Telephone Company is not directly or indirectly controlling or controlled by or under direct or indirect common control with appellant; that appellant failed and refused to file responses to Orders numbers 1, 2, 3, 5, 6A and 9, because such Orders are not applicable to or binding upon it, and that it had filed its responses to Order number 6; that it had made formal application to the Commission for an order or decision that it is not subject to its jurisdiction nor bound to comply with the common carrier provisions of the Communications Act, except in so far as Sections 201–205 thereof apply, which application was then pending and undetermined; and had requested a final order or decision determining that appellant is a "connecting carrier" within the definition contained in Section 3 (u) of the Communications Act of 1934 (47 U. S. C. A., Sec. 153 (u)), and that it is exempted under Section 2 (b) (2) of said Act (47 U. S. C. A., Sec. 152 (b)) from the provisions of said Act, except in so far as Sections 201–205 thereof (47 U. S. C. A., Secs. 201-205) may apply to it (R. 412).

Hearings were held before an Examiner of the Commission. At the outset appellant entered a special appearance, denied the Commission's jurisdiction and claimed

exemption as aforesaid (R. 31). Testimony was offered by appellant and a number of exhibits were offered in evidence (R. 34–410B). The Examiner submitted his Report on June 24, 1936, recommending that appellant be held subject to the jurisdiction of the Commission. Appellant duly filed exceptions to the Report of the Examiner, filed a brief and made an oral argument before the Telephone Division of the Commission on the question whether said Report should be adopted, set aside or modified. On November 18, 1936 the Telephone Division of the Commission submitted a Report and made the Order which is the subject of this suit (quoted on page 3, *supra*).

On December 28, 1936, appellant filed a petition for a re-hearing before the Commission *en banc*, and on January 27, 1937, the Commission made an order denying such a hearing to appellant.

Thereafter and on March 23, 1937, this suit was commenced. At the hearing in the District Court, appellant introduced all of the evidence which was before the Commission.

Facts: Appellant was organized in February, 1920, and began business on August 1, 1921 (R. 35, 417). It now operates telephone exchanges in the City of Rochester and in the Counties of Monroe, Livingston, Wayne, Ontario, Wyoming, Steuben and Orleans, all within the State of New York. The territory served covers an area of approximately 1,986 square miles and includes a population of about one-half million people (R. 424). It neither owns nor operates any properties outside the State of New York. Appellant's lines are physically connected in the State of New York with the lines of New York

Telephone Company enabling it to accept messages from and send messages to points beyond the territorial limits of the State of New York. It is in this respect only that appellant is engaged in interstate communication (R. 1, 424, 425, 445).

Prior to February, 1920, there had been two telephone companies operating in Rochester, New York, and vicinity. One was the New York Telephone Company (Bell) and the other was the Rochester Telephone Company (independent). The new corporation (appellant) took over the properties of both companies and consolidated them into a single telephone system (R. 35–59, 417, 440).

The Rochester Telephone Company was organized in 1899. It was one of a large number of independent telephone operating companies which sprang into being after the expiration of the patent rights owned by the Bell companies. In western New York both the Bell and independent companies operated in the Cities of Buffalo, Rochester and Jamestown. Some of the independent companies were successful for awhile but gradually got into difficulties, principally because of the lack of knowledge concerning depreciation charges and the creation of reserves to care for this item (R. 37). The Bell companies began buying in the independents, and complaint, as in violation of the Sherman Anti-trust Act, was made to the Attorney General of the United States (R. 37). To avoid difficulties which might arise, N. C. Kingsbury, Vice-President of the American Telephone & Telegraph Company, held conferences with the Attorney General, resulting in a letter dated December 19, 1913, written by Kingsbury to the Attorney General, which is commonly called

the "Kingsbury Commitment." This agreement provided, among other things, that:

> "Neither the American Telephone & Telegraph Company nor any other company in the Bell System will hereafter acquire, directly or indirectly, through purchase of its physical property or of its securities, or otherwise exercise dominion or control over any other telephone company owning, controlling or operating any exchange or line which is or may be operated in competition with any exchange or line included in the Bell System or which constitutes or may constitute a line or portion of any system so operated or which may be so operated in competition with any exchange or line included in the Bell System" (R. 296).

To remedy the situation in Buffalo, Jamestown and Rochester it was agreed between the parties that the independent company in Buffalo sell its properties to the Bell Company, and that the Bell Company and the independents in Rochester and Jamestown sell their properties in their respective territories to new companies to be created, managed and controlled by local men (R. 39, 50).

New York Telephone Company, by reason of the Kingsbury Commitment (R. 36, 37), was not in a position to acquire any additional independent telephone companies except with the permission of the Department of Justice. At the time of the organization of appellant the practice of the Department of Justice was to refuse to approve the acquisition by a "Bell" company of an "independent" company unless, as part of the same transaction, the Bell company gave up substantially as many stations as it was acquiring (R. 40). The proposed consolidation of the two telephone systems at Rochester, New York, was sub-

mitted to the Department of Justice along with a proposal for the consolidation of systems at Jamestown, New York, and Buffalo, New York, in each of which cities telephone systems were being operated both by the "Bell" and an "independent" company (R. 39). The result sought to be accomplished by the three consolidations was to create new "independent" companies at Rochester and Jamestown to operate the consolidated properties in those cities and to permit New York Telephone Company to take over the "independent" property at Buffalo, New York. The three proposed consolidations provided for the acquisition by the "Bell" company of some 32,000 stations at Buffalo and the loss of some 35,000 stations to the "independents" at Rochester and Jamestown. These proposals were submitted to the Department of Justice (R. 47). The agreements by which the consolidations of the several properties were to be effected were also submitted and after consideration of the plans and a study of the documents the Department of Justice stated that in its opinion the proposed readjustments at Buffalo, Rochester and Jamestown would not be contrary to the Kingsbury Commitment (R. 54). Accordingly, the three consolidations were carried out—that at Rochester being in strict accordance with the consolidation agreement submitted to the Department of Justice (R. 59).

By its certificate of incorporation dated February 14, 1920, appellant was authorized to issue 70,000 shares of capital stock of the par value of $100 per share, of which 1,000 were common and 69,000 preferred (R. 351). The preferred stock was entitled to priority over the common stock to the full extent of its par value upon distribution of the assets of appellant in the event of insolvency or

dissolution; and its pro rata share with the common stock in any surplus assets remaining after the common stock has been repaid to the full extent of its par value. In addition:

". . . The holders of the preferred stock shall have equal voting power with the common stock, except that they shall be without power to vote at any meetings of the stockholders of the corporation held for the purpose of electing directors or for the adoption or amendment of the By-laws of the corporation, unless and until any time after . . . the close of the second fiscal year (as hereinbefore defined) following the first issuance of preferred stock (whether of the whole or only part of the authorized amount of preferred stock) the corporation has failed (in which event it shall forthwith come into full voting power) to pay out of earnings dividends upon all of the issued and outstanding preferred stock at the rates provided to be cumulated as aforesaid, that is to say, three per cent (3%) for the third fiscal year, four per cent (4%) for the fourth fiscal year following the first issuance, as aforesaid, of preferred stock and five per cent (5%) per annum thereafter.

"No vote or consent of the stockholders upon any question of consolidation with any other corporation, or of the lease, sale or conveyance of any of the property rights, privileges or franchises of the corporation, made otherwise than in the ordinary course and conduct of its business, or of the increase or reduction of the capital stock of the corporation, or of the issuance of preferred stock other than in this certificate provided, or of the guaranteeing of bonds of any other corporation, or of the alteration or amendment of this

> certificate . . . . shall be or become effective for any purpose whatsoever unless concurred in by the affirmative vote or consent of at least eighty per cent (80%) of the then issued and outstanding common stock of the corporation.
>
> "Each stockholder entitled . vote at meetings held for the election of directors shall be entitled to as many votes as shall equal the number of his voting shares of stock multiplied by the number of directors to be elected, and he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit . . . ." (R. 352-354).

When appellant took over the properties of the New York Telephone Company (Bell) and the Rochester Telephone Company, it paid the New York Telephone Company for its property by issuing 48,140 shares of its preferred stock of a par value of $4,814,000 to the New York Telephone Company. It paid the Rochester Telephone Company for its property in cash, the cash representing part of the proceeds of an issue of bonds secured by a mortgage on appellant's entire property (R. 45, 46, 418).

The preferred stock so issued to the New York Telephone Company has been continuously held by the New York Telephone Company and is so held at the present time (R. 78, 100, 102, 418).

The issued common stock of appellant consists of 1,000 shares of the par value of $100 each (R. 42, 60, 61, 418). 335 (33.5 per cent.) shares of the common stock were originally issued to the New York Telephone Company, or its nominee, and are now held by the New York Telephone Company (R. 61; 418). 665 (66.5 per cent.)

shares of the common stock of appellant were originally issued to Messrs. George R. Fuller, as Trustee, Fred. C. Goodwin and W. Roy McCanne and those 665 shares were immediately deposited with a depositary under a voting trust agreement in which Messrs. Fuller, Goodwin and McCanne were designated as voting trustees and empowered to exercise *all rights* (including the right to vote) with respect to all such stock (R. 367). The original voting trust agreement terminated in 1926 and upon its termination these same 665 shares were again deposited under a similar voting trust agreement which terminated July 31, 1936 (R. 56). By purchase from the estates of Messrs. Fuller and McCanne, Mr. Fred. C. Goodwin became the owner of voting trustees' certificates representing their shares of common stock, so that on November 23, 1934 Mr. Goodwin was the owner of voting trustees' certificates representing the entire 665 shares of such common stock (R. 58, 59). On December 3, 1935, Mr. Goodwin transferred voting trustees' certificates, representing 332 shares of common stock, to his wife, Marion J. Goodwin. At the time of the hearing before the Commission and at the present time the entire 665 (66.5 per cent.) shares of common stock are deposited under a voting trust agreement. The agreement in existence at the time of the hearing terminated July 31, 1936, but Mr. Goodwin testified that he intended to renew it (R. 59) and in fact it has since been renewed for an additional ten-year period. If and when the voting trust terminates, Mr. Fred. C. Goodwin is entitled to have transferred to him 333 shares of the common stock now standing in the name of the voting trustees and Mrs. Fred. C. Goodwin is entitled to have transferred to her 332 of such shares, in accordance with

voting trustees' certificates issued to each of them for such number of shares.

As indicated above, these 665 shares of common stock were originally subjected to a voting trust agreement at the time appellant first began business in 1921. That procedure was followed because it was provided for in the supplemental agreement of February 25, 1918 (R. 332), "in order to assure local management and control of said new corporation" (appellant). In that voting trust agreement it was provided that in voting the stock deposited under the agreement the voting trustees should elect a "board of suitable directors" at least a majority of whom (as is true in respect of the voting trustees and their successors (R. 58, 368)) shall be "residents or business men *within the territory served* by appellant, *and in no way affiliated or connected with the American Telephone and Telegraph Company or the New York Telephone Company*" (R. 368). The original voting trust agreement terminated July 31, 1926, and on August 1, 1926, a new voting trust agreement was executed (R. 56–58). It was in exactly the same form as the original voting trust agreement except that its duration was ten years (expiring July 31, 1936) instead of five. The same voting trustees were named as were named in the original voting trust agreement (R. 57). Mr. Fuller and Mr. McCanne died after the execution of the voting trust agreement existing at the time of the hearing, and Messrs. John P. Boylan and J. Foster Warner, both of Rochester, New York, were designated as their successors (R. 57). Messrs. Goodwin, Boylan and Warner were the voting trustees at the time of the hearing, but Mr. Warner has since died and has been succeeded by Raymond N. Ball, President of

Lincoln-Alliance Bank and Trust Company of Rochester, New York.

On March 26, 1926 appellant amended its certificate of incorporation so as to increase its capital stock to $12,000,000, consisting of 120,000 shares of the par value of $100 each (R. 376). Of these shares 1,000 represented the common stock issued and outstanding as aforesaid; 50,000 shares were classified and designated first cumulative preferred stock; and 69,000 shares (including the 48,140 shares issued and outstanding as aforesaid) were reclassified and designated second cumulative preferred stock (R. 379). The first cumulative preferred stock has no power to act in the management of appellant and is subject to redemption (R. 382, 383). The holders of the second cumulative preferred stock retain the same powers quoted above, but this stock is not subject to redemption.

Appellant has outstanding said $100,000 of common stock, $2,282,600 of first preferred stock, said $4,814,000 of second preferred stock and bonds in the amount of $6,238,000 (R. 418). The common and second preferred stocks are owned as described above. All of appellant's first preferred stock and bonds are outstanding in the hands of the public (R. 102, 103, 418).

ERRORS TO BE URGED

Appellant intends to urge the following assigned errors:

The District Court erred:

1. In finding (XIX) that New York Telephone Company has power to control appellant and that the plan providing for appellant's organization and incorporation, election of directors and the placing of its common stock

in a voting trust gave control directly and indirectly to New York Telephone Company (R. 452).

2. In concluding (I) that appellant is a wire telephone carrier subject to the Communications Act of 1934, except in so far as Sections 201 to 205 of said Act, both inclusive, shall, except as otherwise provided therein, apply to appellant (R. 453).

3. In concluding (II) that appellant is subject to regulation under the Commerce Clause of the Federal Constitution, except in so far as Sections 201 to 205 of the Federal Communications Act, both inclusive, shall, except as otherwise provided therein, apply to appellant (R. 453).

4. In concluding (V) that Congress intended "control" as used in the Federal Communications Act, to be so broadly construed as to embrace every form of control, actual or legal, direct or indirect, negative or affirmative (R. 453).

5. In concluding (VI) that by means of stock ownership, election of directors, the placing of common stock in a voting trust, and as a dominant financial feature of appellant's organization, taken together with certain contractual arrangements with New York Telephone Company, that New York Telephone Company has the power to control, directly and indirectly, appellant within the meaning of Section 2 (b) (2) of the Communications Act of 1934 (R. 453).

6. In concluding (VII) that appellant is not deprived of its property without due process of law, in violation of the Federal Constitution, by the provisions of the Order of the Federal Communications Commission quoted on page 3, *supra* (R. 453).

7. In concluding (VIII) that the Federal Communica-

tions Commission, in making and issuing the Orders complained of, and as applied to appellant, did not act in an unreasonable or arbitrary manner or exceed the power and authority delegated to it by the Communications Act of 1934 (R. 453, 454).

8. In concluding (IX) that appellant is not entitled to a decree vacating, setting aside and annulling the Orders of the Federal Communications Commission described in its petition herein and is not entitled to the equitable relief prayed for in its petition or bill of complaint (R. 454).

8. In concluding (IX) that appellant's application for a permanent injunction and other relief should be denied in all respects (R. 454).

SUMMARY OF ARGUMENT

I. THE COMMISSION, IN MAKING THE ORDER COMPLAINED OF, EXCEEDED THE POWERS DELEGATED TO IT BY THE ACT, AND THE DISTRICT COURT ERRED IN REFUSING TO REACH AN INDEPENDENT DECISION ON THE ISSUE OF EXEMPTION.

II. THE COMMISSION, IN MAKING THE ORDER COMPLAINED OF, DEPARTED FROM APPLICABLE RULES OF LAW, AND ITS ARBITRARY AND CAPRICIOUS FINDINGS WERE NOT ONLY NOT BASED ON SUBSTANTIAL EVIDENCE BUT WERE MADE IN THE FACE OF OVERWHELMING SUCH EVIDENCE TO THE CONTRARY.

III. THE DISTRICT COURT SHOULD HAVE ENJOINED THE ORDER OF THE COMMISSION AND THE DECREE BELOW SHOULD, THEREFORE, BE REVERSED.

ARGUMENT

I

THE FEDERAL COMMUNICATIONS COMMISSION, IN MAKING THE ORDER COMPLAINED OF, EXCEEDED THE POWERS DELEGATED TO IT BY THE ACT, AND THE DISTRICT COURT ERRED IN REFUSING TO REACH AN INDEPENDENT DECISION ON THE ISSUE OF EXEMPTION.

The appellees successfully urged upon the District Court that the findings and Order of the Commission were made on substantial evidence and that the Court was bound by the same. The Opinion of the Court clearly and affirmatively reveals not only that it did not consider the issue and underlying facts *de novo*, but that it considered that it was bound by the determination of the Commission:

> ". . . The Commission could find, as it did, that . . . the New York Telephone Company has power to control the petitioner.
>
> ". . . We are obliged to accord proper weight to the findings of the Commission which conducted hearings and heard argument on the questions involved. . . . The determination of the Commission under the proof here is binding upon us . . ." (R. 437).

A comparison of the Court's Opinion (R. 437) with the report of the Commission (R. 429) also indicates that the Court made no independent scrutiny of the evidence. The District Court's findings and conclusions (R. 438) were prepared and submitted to it by counsel some weeks after it rendered its opinion in accordance with the requirements of this Court's Equity Rule, LXX½ (R. 449)

These findings and conclusions (R. 439–449) are simply a counterpart of those contained in the Report of the Commission (R. 411–430).

At the outset at the hearing before the Commission, appellant challenged the power of the Commission to determine the issue of exemption (R. 31). It maintained this position throughout the hearings before the Commission and on argument in the District Court. Further, it assigns as error on this appeal the conclusion of the District Court that the Commission possessed such power (R. 448).

In the District Court, appellant introduced *all* of the evidence which was before the Commission. No new evidence whatsoever was offered by any of the parties. The Court, in the presence of this evidence, failed to exercise its independent judgment upon the issue of exemption. In this it erred.

United States v. Idaho, 298 U. S. 105.

This suit is not one brought to set aside an order of the Commission on a matter within its jurisdiction, for whether appellant is not controlled by New York Telephone Company and hence entitled to the exemption provided in the Act, *supra*, is a mixed question of fact and law (R. 427) which was left by Congress to the decision of a court —not to the Commission.

United States v. Idaho, supra.

As appellant, concededly, is engaged in interstate communication, the question as to whether it should be subject generally to the provisions of the Communications Act was one purely for the decision of Congress. Since Congress was also free to establish exceptions to its pow-

er of regulation over appellant, it *could have* delegated to the Commission the power to determine the questions of fact on which exceptions are to be based. But Congress *did not* delegate this power to the Commission, and the Act will be read in vain for even an implication of intent so to delegate. Since Congress did not delegate this power to the Commission, it follows that the decision should have been made by the Court, and that it was not bound by the determination of the Commission, however persuasive.

In *United States v. Idaho, supra,* appellant's contention is clearly illustrated and upheld. There the Interstate Commerce Act denied to the Interstate Commerce Commission the power to decide whether certain trackage was a "spur" and, therefore, excluded from the jurisdiction of the Commission. This Court held (p. 109) that the question was a "mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission." This Court concluded, therefore, that the findings and order of the Commission were not conclusive on the District Court, and that the District Court properly came to an independent determination of the issue under the facts.

By contrast, the recent opinion of this Court in *Shields v. Utah Railroad Company*, 305 U. S. —, U. S. S. C. L. ed. Adv. Opinions, Vol. 83—No. 4, page 170, also demonstrates the point which we urge here. There Congress established a category of exception to the Railway Labor Act and *expressly delegated* to the Interstate Commerce Commission the power to determine the question of fact upon which the exception turned. In such a situation, so long as there is compliance with the requirements of

due process, the courts are not concerned with the wisdom or expediency of the exercise of power validly conferred.

The point we make here we consider elementary. In our view there is involved simply an exercise by the Commission of a power not conferred upon it by the legislature. Such a view presents no issue of constitutionality. If we have thus correctly stated the question, it is clear that the cases cited in the Court's opinion (R. 437) are not there in point.

St. Joseph Stock Yards Co. v. United States, 298 U. S. 38;
Mfgrs. Ry. Co. v. United States, 246 U. S. 457;
Interstate Commerce Commission v. Ill. Central Ry. Co. 215 U. S. 452;
Interstate Commerce Commission v. Union Pacific Ry. 222 U. S. 541;
Florida v. United States, 292 U. S. 1.

In all of said cases the delegation by Congress of the authority in question was undisputed. Under such circumstances, provided due process has been had, we concede that it is well settled that it is not the province of the courts to substitute their judgment for that of administrative bodies.

In the instant situation, Congress did not choose to delegate the power to determine the exemption to the Federal Communications Commission. That it could have done so is of no moment. That it desired to leave the decision of so intimate a matter as a jurisdictional exemption to the courts rather than to a newly created administrative body is likewise of no consequence. The fact is that it did not delegate the power to make the determination to the Commission. It was, therefore, incumbent up-

on the District Court to make the determination under the evidence. This it did not do.

II

THE COMMISSION, IN MAKING THE ORDER COMPLAINED OF, DEPARTED FROM APPLICABLE RULES OF LAW, AND ITS ARBITRARY AND CAPRICIOUS FINDINGS WERE NOT ONLY NOT BASED ON SUBSTANTIAL EVIDENCE BUT WERE MADE IN THE FACE OF OVERWHELMING SUCH EVIDENCE TO THE CONTRARY.

We have just argued under Point I that Congress did not give the Commission power to decide the issue of exemption and that the District Court erred in refusing to consider said issue *de novo*.

Both the Commission (R. 429) and the District Court (R. 437, 448) concluded that New York Telephone Company has the *power to control* appellant. We now proceed to a discussion of the term "control" as the same was used by Congress in the statute in question and to a consideration of the evidence upon which the Commission relied in making the Order in issue.

Both the Commission (R. 429) and the District Court (R. 433) concluded that Congress intentionally left "control" undefined in the statute and intended the term to include "actual" control as well as what has been called "legally enforceable" control. Assuming, for the purpose of this argument, that this interpretation is correct, we submit that New York Telephone Company has neither type of control over appellant.

A

Appellant is "legally" controlled by the voting trustees who vote two-thirds of its common stock and not by New York Telephone Company and there is no substantial evidence in the record to the contrary.

Common Stock and Voting Trust: The only stock of appellant which now or at any time is or has been entitled to vote for directors is its common stock (R. 382, 419, 435, 442). New York Telephone Company owns one-third (335) shares of this stock. A majority (actually two-thirds (665 shares)) of its entire outstanding common stock is deposited under a voting trust agreement (R. 364). This agreement designates three Voting Trustees and empowers them to exercise all rights (including the right to vote) with respect to all such stock (R. 367). These Voting Trustees are all Rochester citizens and in no way connected or affiliated with the New York Telephone Company (R. 63–66, 444). In the exercise of their control these Voting Trustees have at all times elected a board of fifteen directors, ten of whom are residents or business men within the territory served by appellant and in no way affiliated or connected with American Telephone & Telegraph Company or New York Telephone Company (R. 63–66, 444). These ten local directors are outstanding leaders in the business and civic life of Rochester, New York (R. 63–66).

Beneficial Ownership of Common Stock: The beneficial owners of the common stock deposited under the voting trust agreement and the holders, therefore, of the voting trust certificates issued thereunder are Fred. C.

Goodwin and his wife, of Rochester, New York (R. 61, 373, 418, 434, 444). Thus, if there were no voting trust today, Goodwin and wife would vote said common stock (665 shares of common). Goodwin was one of the principal witnesses at the hearings before the Commission and testified positively that the stock is never going to go out of his hands and that he has a plan worked out for passing the stock along in such a way that appellant will be kept independent of New York Telephone Company. He further testified that he intends to pass on the ultimate and beneficial ownership of that stock to his oldest son who has been with appellant for some years and is now its Secretary (R. 105). Despite this uncontroverted testimony of Goodwin, the Commission found that the placing of this common stock (665 shares) in a voting trust gave control of appellant to New York Telephone Company (R. 429, 437, 448). The record not only does not show that New York Telephone Company required or dictated this voting trust arrangement but it definitely shows that the Department of Justice, in holding that the consolidation at Rochester would not be contrary to the "Kingsbury Commitment," passed on the plan to place this common stock in a voting trust (R. 49, 50, 53, 54).

Legal Control: Clearly, therefore, the "legal" control of appellant is in the Voting Trustees who vote the two-thirds of its common stock.

The courts have uniformly held that the ownership of a majority of the voting stock of a corporation gives the owner of that stock control of the corporation. By statute law, in practically every state in the Union, the affairs of a corporation are required to be managed by its board

of directors. By similar statute law the directors are required to be elected by the stockholders of the corporation. Thus, the ultimate source of corporate control—as exemplified by what the corporation does—is vested in stockholders holding a majority of the voting stock.

Fletcher Cyclopedia Corporations (permanent Ed. Vol. 5, Sec. 2096, p. 336).

"It is too plain to bear argument that the ownership of the stock of the corporation carries with it the control of the corporation. Indeed, this is merely a different way of stating the truism that a corporation is controlled by its stockholders. That they did it through the agency of a Board of Directors and other officers does not alter the fact."

Penn. RR. Co. v. Commonwealth, 7 Atl. 368.

"It is the common experience of mankind that the acts of corporations are dictated and that their policy is controlled *by those who own a majority of their stock*. Indeed, one of the favorite methods in these days, and about the only method, of obtaining control of a corporation, *is to purchase the greater part of its stock*. It was the method pursued by the Northern Pacific and Great Northern Companies to obtain *control* of the Chicago, Burlington and Quincy Railroad, and, so long as Directors are chosen by stockholders the latter will necessarily dominate the former, and in a real sense determine all important corporate acts."

U. S. v. Northern Securities Co. 120 Fed. Rep. 721, 725.

"The fact that the ownership of a majority of the capital stock of a corporation gives one the mastery and control of a corporation was distinctly recognized and declared in *Pearsall v. Great Northern Railway*, 161 U. S. 646, 671, 16 Sup. Ct. 705, 710, 40 L. Ed. 838. The same fact has been recognized and declared by other courts. *Pennsylvania R. Co. v. Commonwealth* (Pa.) 7 Atl. 368, 371; *Farmers' Loan & Trust Co. v. New York & Northern Railway Co.* 150 N. Y. 410, 425, 44 N. E. 1043, 34 L.R.A. 76; *People ex rel. v. Chicago Gas Trust Co.* 130 Ill. 268, 22 N. E. 798, 802, 8 L.R.A. 497, 17 Am. St. Rep. 319."

U. S. v. Northern Securities Co., 120 Fed. Rep. 721, 726.

"With *half* of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course, and the *mastership* of the Northern Pacific would be assured."

Pearsall v. Great Northern Ry., 161 U. S. 646, 671.

"Every stockholder impliedly agrees, on becoming a member of the corporation, that the management and control of the corporate business and interests shall be vested in the majority."

First National Bank v. Waterloo and Fire Proof Storage Building Co., 199 Iowa 1285.

"Corporate control is usually the result either of one person having a majority of the stock, or ownership of a majority of the stock by another corporation, or ownership of a majority of the stock by

part of the stockholders of another corporation, or a combination of stockholders so as to control a majority of the stock."

Fletcher Cyclopedia Corporations, Vol. 13, Sec. 5762, p. 55.

The following quotation is from the case of *Farmers L. & T. Co. v. N. Y. & N. R. Co.*, 150 N. Y. 410, 425:

"The clear and legitimate inference to be drawn from the circumstances proved in this case is that after the N. Y. C. and Hudson River Railroad Company purchased a majority of the stock and bonds of the New York and Northern Railroad Company it *controlled* its officers and directors as fully and completely as though they had been elected by its votes. . . . Indeed, it is a matter of common knowledge that where the ownership of a majority of the stock of such a corporation changes, the Board usually changes, unless its members are already in harmony with the policy of the purchasers."

The Transportation Act of 1920 gave the Interstate Commerce Commission power to approve the acquisition (short of consolidation) of *control* of one carrier subject to the Act by another carrier. Several decisions under Section 5, Sub. 2, of the Act define the meaning of "control" as thus used.

In re *Purchase of Stock of C. A. & R. I. Ry. v. Rock Island*, 72 I. C. C. 273, the question arose as to whether a certain agreement between the Toledo, St. Louis & Western Railway, in receivership, and the Chicago, Rock Island & Pacific Railway, whereby the latter acquired part of the common and preferred stock of the C. A. & R. I.

Ry., amounting in all to 28.5% of the total outstanding capital stock of the latter, gave the Chicago, Rock Island & Pacific control of the C. A. & R. I. Ry., under Section 5, Sub. 2, of the Transportation Act of 1920. It was held that it did not.

In the Matter of the Application of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for authority to acquire control of the Peoria & Eastern Railway, 71 I. C. C. 747, it appeared that the applicant held $5,000,100 par value of the capital stock of the Peoria & Eastern Railway Co., out of $9,994,200 outstanding. The application was for authority to purchase all the outstanding capital stock *not already owned* by the applicant. The Commission said:

> "The purchase of the remaining stock of the carrier will not give the applicant any other or further *control* over such carrier than that which it had acquired prior (1890) to the enactment of the paragraph (referring to Paragraph 2 of Sec. 5 of the Interstate Commerce Act)."

In Nickelplate, Erie & Western Contract, 72 I. C. C. 151, the question arose as to what kind of control was meant by Section 5, Sub. 2, of the Transportation Act of 1920, in order to relieve the parties from the operation of the Clayton Act. The Commission said:

> "We think the control that the framers had in mind is the full and complete control which may be exercised by the owners of a majority of the capital stock of a carrier or by the lessee of the property. . . ."

Possibility of "Legal" Control: Both the Commission

and the Court below intimated that there is a possibility that New York Telephone Company may some time control appellant. A possibility is not power. The possibility that the New York Company may come into control in the future, by reason of the voting rights given to the second preferred stock, in case dividends are not paid, or by reason of some possible future acquisition of the common stock now held by the Voting Trustees, is immaterial. The question to be decided is whether the New York Company now has any such control as is contemplated by Section 2 (b) (2). As a matter of fact, it would be extremely simple for the directors of appellant to transfer absolute control to the New York Company without any change at all in the stock ownership, by the simple expedient of failing to declare dividends on the second preferred stock for such a period as would entitle that stock to full voting rights. It is not obligatory upon the directors to declare dividends, even if earned; and during the depression appellant for several years failed to earn enough to pay the full dividends on the second preferred stock (R. 117, 118). If the appellant's directors had had any intention or desire to turn over control to the New York Company, they could easily have done so during the depression by passing the dividends on the second preferred and common stocks, and they would have had a reasonable excuse for passing these dividends, in the practice of numerous corporations which did so during the depression when current earnings were insufficient to cover them. The fact that they did not do so, but continued to pay the full dividends, even at the expense of dipping into the surplus of appellant, is strong evidence of the intention of the board of directors of appellant to maintain its independ-

ence of the New York Company. It has further been shown that the present surplus of appellant, assuming only that it continues its earnings at the rate of return during the depression, will be sufficient to pay the interest on the bonds and dividends on both issues of preferred stock for something over forty years (R. 142, 420, 435, 443). So that even if the possibility or likelihood of the second preferred coming into full voting power were material on the question of present control, that likelihood and possibility have been completely negatived.

And, indeed, the Commission's Examiner conceded at the hearing that control at the present time and not possible future control is the type of control embraced by the Act.

> "Mr. Nixon : Are we talking about actual control of this company now or of the possibility of the control passing away in the future sometime to somebody else? I had supposed that we were directing this inquiry to where control lies at the moment.
>
> "The Examiner: That is the issue." (R. 105).

"Veto Power" Over Extraordinary Acts: The Commission and the Court below stressed the fact that New York Telephone Company, by reason of its ownership of the second preferred stock and thirty-three and one-half percent of the common stock of appellant, can prevent it from consolidating with any other corporation; leasing, selling or conveying its property or franchises, other than in the ordinary course of business; increasing or reducing its capital stock; issuing preferred stock, other than provid-

ed for in the certificate of incorporation; guaranteeing the bonds of any other corporation; altering or amending its own certificate of incorporation. The second preferred stock likewise has voting power on all propositions, except for the election of directors of the corporation, or the amendment of its by-laws, as to which the second preferred will not be entitled to vote unless default is made in the payment of the dividends thereon for two successive fiscal years. The evidence is that, assuming that appellant's earnings continue only at the average for the last three years, which have been the lowest in its history, it will be able to continue to pay dividends on the preferred stock out of surplus for forty years or more (R. 142).

The mere existence in New York Telephone Company of a power to *veto* the various *unusual* acts specified above, does not give it any such control of appellant as the statute contemplates because even the total inability of appellant to perform those acts would not affect the normal conduct of its business. It is to be noted that even with regard to these acts, New York Telephone Company *cannot compel the performance of any of them*, because the consent of at least eighty percent of the common stock is required, and sixty-six and one-half percent of that stock is held by the Rochester stockholders.

It is submitted that the intention of Congress was that the term "control" should be given a fair and reasonable interpretation, with a view to making the statute effective to remedy such evils as may have existed in the situation before the statute was passed. It is a well settled rule for the interpretation of statutes that in determining their meaning reference may and should be had to the situation which the statute was intended to correct.

Federal Trade Comm. v. Western Meat Co., 272 U. S. 554.

Texas and P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 210.

Holy Trinity Church v. United States, 143 U. S. 457.

In the present case, the intention of Congress was obviously to prevent carriers which are really engaged in interstate business from removing substantial parts of their business, properly subject to federal regulation, from the jurisdiction of the Commission by the device of having such business conducted by a technically separate subsidiary corporation whose business operations are, however, under the actual control of the interstate carrier; and similarly to prevent such a carrier escaping the jurisdiction of the Commission by any device whatsoever, whether specifically mentioned in the statute or not. In view of the fact that the ingenuity of lawyers in thinking up new devices for such purposes is apparently boundless, Congress was doubtless well advised in not attempting to specify or define in any way what would constitute control by one carrier of another. There was, however, no reason for Congress attempting to subject to the jurisdiction of the Federal Communications Commission companies whose business is essentially intrastate, and whose ordinary business, including the fixing of rates and all its regular business practices, is free from any control by an interstate carrier. Such companies are in practically every case subject to the jurisdiction and control of the state public service or similar commissions. It was obviously with this in

view that Congress included in the law the exemption contained in Section 2 (b) (2). It recognized, as any one must recognize, that any telephone company which seeks to furnish a reasonable service to its subscribers under modern conditions must be connected with the Bell system for the purpose of toll calls, but so long as the Bell system has no power to direct, manage, or in other words "control," the ordinary business activities of the local company, there is no reason for attempting to subject the local company to the jurisdiction of a federal commission. The federal Commission has ample power to control the rates and practices as to interstate toll calls, not only by reason of its control of the interstate companies but by virtue of Sections 201–205 of the Act which appellant concedes are applicable to it (page 3, *supra*).

The rates, charges and ordinary business practices of appellant herein are determined by its officers and board of directors, subject, of course, to regulation by the Public Service Commission of the State of New York, as provided by the statutes of New York State. To some extent, the actions of the directors are controlled by the by-laws of appellant. New York Telephone Company, by reason of its ownership of the second preferred stock, has no vote either in the election of directors or as to amending the by-laws, and probably could not have any such vote for at least forty years. By reason of its ownership of thirty-three and one-half percent of the *common* stock, it does have a vote, but not a controlling vote, on these questions. The election of directors and the amendment of the by-laws are both controlled by the Rochester stockholders, who hold sixty-six and one-half percent of the common stock. New York Telephone Company actually has in the

past nominated five, out of the total number of fifteen directors of appellant. But even if all five regularly attended the directors' meetings, they could be outvoted by the local directors, nominated and chosen by the local stockholders. The evidence is that, on the average, the directors' meetings are attended by seven of the local directors, and from two to three of the New York Company directors (R. 129).

If the existence of a mere veto power on such unusual acts amounts to "power to control" (R. 425, 437) then it must be true that a minority of the States of this country control the Federal Government, by reason of the fact that they are able to prevent the adoption of any amendments to the Constitution of the United States. Under the statutes of the State of New York it requires the consent of at least two-thirds of the total number of shares entitled to vote in order for a corporation to mortgage its property and franchises (Stock Corporation Law, Sec. 16), to sell and convey its property, rights, privileges and franchises (id. Sec. 20), to consolidate with another corporation (id. Sec. 86), or to dissolve (id. Sec. 150). It would be true, if the Commission is correct, that the holders of a minority interest in the stock of every New York Corporation control that corporation, although they may be unable to elect a single director or to have any say whatsoever as to the conduct of the corporation's regular business.

There is no question that the New York Company has a substantial interest in the prosperity of appellant by reason of the transfer to it of something over $4,000,000 worth of assets of the New York Company and the issuance to the New York Company, in return for those

assets and for cash advanced, of all of the second preferred stock and approximately one-third of the common stock. There can also be no question that in order to protect this investment the New York Company has been given power to prevent or veto a number of drastic or extraordinary acts on the part of appellant, any of which might tend substantially to lessen the value of the New York Company's investment, or result in the Rochester Telephone Corporation practically going out of business. This veto power, however, does not give the New York Company any ability to control the ordinary operations of appellant.

B

Appellant is "actually" controlled by the voting trustees aforesaid and not by New York Telephone Company, and there is no substantial evidence in the record to the contrary.

"Actual" Control: It has been pointed out above and we submit, clearly and conclusively, that New York Telephone Company does not "legally" control appellant. One might consider that this so-called "legal" test reflects the conventional or perhaps old fashioned concept of corporate control.

Modern development of the corporate system has in many instances brought about such a separation of ownership and control that the application of the conventional or "legal" test to many present-day corporations will not reveal the actual source of control. There has, accordingly, arisen the concept of control which we may call "actual," which looks behind outward forms to the real source from which the power to manage springs.

Berle and Means, The Modern Corporation and Private Property (1932), Chap. V, pages 69–118. Recognizing this trend, Congress, in using the term "control" in Section 2 (b) (2) of the Communications Act, *supra*, intended it to embrace not only "legal" control but "actual" control by whatever device or artifice employed (page 3, *supra*).

Regardless of the source of the power, however, whether it be "legal" or "actual," control, as used in connection with corporations, still means ". . . the actual power to select the board of directors, (or its majority) . . ." (*Berle and Means, supra*, page 69).

Although the Commission (R. 429) and District Court (R. 433) stated that Congress, in using the term "control" in the Act, *supra*, intended to include both the "legal" and "actual" concepts of the term, they neglected completely to distinguish the two concepts in applying the term to appellant. It necessarily follows, however, that the Commission concluded that appellant is "actually" controlled by the New York Company, despite the overwhelming evidence in the record to the contrary. We proceed to a review of this evidence.

Business Relations: Appellant has always done its own financing (R. 67, 68, 445). Mr. Goodwin himself conducted all of the negotiations for the sale of the preferred stock issued in 1926 (R. 63). In 1928 he arranged for the sale of $5,000,000 of four and one-half percent bonds and out of the sale price $3,500,000 of six percent bonds were retired, leaving about $1,500,000 for extensions and additions to plant (R. 67). The last financing done by appellant, in the Fall of 1935, was handled by Mr. Goodwin personally (R. 68). Never-

since the organization of appellant in 1921, has it had any financial assistance from New York Telephone Company or any "Bell" company, except a loan of $150,000 for working capital when it was first organized and which was paid back within a few months (R. 68).

The majority of the purchases of supplies and equipment are made from independent manufacturers and local jobbing concerns, the principal telephone equipment being purchased from Stromberg-Carlson Telephone Manufacturing Company at Rochester (R. 130, 131).

Proposals for new construction, additions to the plant and matters of that nature originate in the Engineering or other proper department of appellant (R. 126), and it has never had any engineering assistance from New York Telephone Company because it has an Engineering Department of its own (R. 126, 199, 200).

No so-called license fees are paid by appellant to New York Telephone Company and no part of its gross revenues has ever been paid to New York Telephone Company except for services actually performed and at rates which were considered reasonable (R. 109, 130).

Every officer of appellant who was employed by that corporation at the date of its organization in 1921, if alive, is still an officer of appellant (R. 65, 66, 132), whereas the evidence is that the personnel of the staff of New York Telephone Company changes frequently (R. 65).

The record shows a number of important differences between practices followed by appellant and practices followed by New York Telephone Company in similar matters, such as the setup and contents of the telephone directory (R. 133), the observance of holidays (R. 134), the method of payment for coin box collections (R. 134),

scheduled rates for services (R. 135) and other matters (R. 446).

There are fifteen directors of appellant, ten of whom are outstanding Rochester citizens entirely independent of New York Telephone Company (R. 63–66, 422, 437, 444). New York Telephone Company elects five of these fifteen directors because of its ownership of 335 shares of the common stock and the provisions for cumulative voting applicable to that stock (R. 63, 107, 384, 423, 437, 444). Out of that number the entire five were present at only one meeting of the board of directors. Three or four times four of the five were present at a directors' meeting. At over ninety percent of the directors' meetings there have been less than three of the New York Telephone Company directors present (R. 129, 446). The local directors outnumber the "Bell" directors two to one and the average attendance at all the directors' meetings is about seven Rochester directors to three or less of the "Bell" directors. The only time the "Bell" directors ever come to Rochester is to attend meetings of the board of directors and the only times the President and General Manager of appellant has ever seen any "Bell" director in Rochester, except at the regular monthly meeting of the board of directors, were on three occasions, each of which was at the funeral of some officer or director of appellant (R. 216, 217).

History: The Commission concluded that the plan providing for appellant's organization was designed for the express purpose of enabling the New York Company "to have and retain the power to control the functions of" appellant and "that such purpose has been fully accomplished" (R. 429).

This sweeping statement as to the express purpose of the organization of appellant can be sustained only on the assumption that the testimony given by the witness, Fred. C. Goodwin, is false, and that the Attorney General of the United States was negligent, to say the least, in enforcing the provisions of the Kingsbury Commitment. It appears clearly from the testimony as a whole, that the entire purpose of the organization of appellant was to establish a corporation for conducting the telephone business of Rochester and vicinity which would be independent of and free from the control of New York Telephone Company and the Bell system (R. 36–54). There is nothing in the testimony to indicate in any way that Mr. Goodwin's statements were either false or erroneous and, since there was absolutely no proof offered to the contrary, they should certainly have been accepted.

Furthermore, the Bell system had agreed, by the Kingsbury Commitment, that it would not acquire, directly or indirectly, dominion or control over any other telephone company operating in competition with the Bell system (R. 36, 296, 415). As stated in the Report of the Telephone Division, it was, therefore, necessary, before the acquisition by New York Telephone Company of the independent company in Buffalo could be carried out, that the approval of the Department of Justice be first obtained; and, as shown by the testimony of Mr. Goodwin and the report of the Telephone Division, this approval could not be obtained unless at the same time the Bell system agreed to "relinquish and dispose of approximately the same amount of its own facilities to other independent companies" (R. 40, 415). The entire plan for the acquisition by New York Telephone Company of the independent com-

pany in Buffalo and for the organization of independent companies in Rochester and Jamestown, and the transfer to them of the New York Company's facilities, was submitted to the Department of Justice and was carried out exactly in accordance with the plan as submitted (R. 59). Unless the Department of Justice was remiss in its duties to the Government of the United States, it must, therefore, have found that appellant, as about to be organized, was and would be an independent company free from the control of the Bell system. The details of the stock ownership, upon which the Report of the Commission was largely based, were included in the proposal submitted to the Department of Justice, and it must accordingly have found that such stock ownership would not give control to the New York Company.

It is significant that the Commission decided that Jamestown Telephone Corporation is exempt from the Act, *supra*, under Section 2 (b) (2) thereof, *supra*, although the plan for the organization of appellant and Jamestown and the acquisition by New York Telephone Company of the independent company in Buffalo were simultaneously submitted to and approved by the Department of Justice under the Kingsbury Commitment. In addition, the stock setup of Jamestown Telephone Corporation, as it relates to New York Telephone Company, is substantially similar to such relationship of appellant to New York Telephone Company. *In the Matter of Jamestown Telephone Corporation*, 4 F. C. C. 326 (1937).

In this connection, some point was made by the Commission (R. 422, 423) and by the Court below (R. 436) that the money which was used to pay for the 665 shares of common stock of appellant, now held by Mr. Goodwin

and his wife, was advanced by the New York Company to Messrs. Fuller, McCanne and Zoller, and it was intimated that calling this advance a payment to these gentlemen for services was merely camouflage. It is patent, however, that the services of these men in bringing about the organization of Rochester Telephone Corporation were of very great value to the New York Company. If appellant had not been organized, the New York Company would have been unable to acquire the property and franchises of the independent company in the larger territory of Buffalo (R. 39, 90). Furthermore, by the organization of appellant a situation in Rochester, under which both the New York Company and the existing independent company were doing business as competitors, at a loss, was eliminated, and an arrangement was made by which the New York Company obtained a reasonable chance of receiving some return on its investment in the telephone business in Rochester and the neighboring territory (R. 71–76). Subsequent events have shown that in fact the New York Company has received such a return on its investment ever since the end of the second calendar year after the organization of appellant. There is no reason, therefore, for a finding that the payment for services by the New York Company to the persons chiefly responsible for the organization of appellant was in fact only a gift.

Even if this payment to Messrs. Fuller, McCanne and Zoller was in fact a pure gift by New York Telephone Company, and was only called a payment for services for some such purpose as the deception of the New York Public Service Commission, it did not result in the New York Company obtaining any control of the 665 shares of the

common stock which were purchased with this payment. That stock was issued to Rochester men, who were in no way connected with New York Telephone Company, and under an agreement that it would be put in a voting trust (R. 41, 49, 50, 60, 82, 92). It is now owned by Goodwin and wife, so far as the beneficial ownership is concerned; and even if the original holders had been in some way subject to the domination of the New York Company (of which there was no proof whatsoever), there is absolutely nothing to show that either Goodwin or his wife is subject to any such domination, and he testified positively that they were not (R. 92, 104, 105). Consequently, even if the New York Company originally intended to obtain control of this major portion of the voting stock of appellant, it has certainly failed to do so; and even if it had any control of this stock in the past (which it obviously did not), it has no such control in the present.

Toll Switchboard: The Commission's Report indicates that it may have attached some slight importance to the fact that appellant employs New York Telephone Company to switch some of its intraterritorial (intrastate) toll calls, namely, all such calls originating or terminating in the City of Rochester (R. 424–427). The reason for this practice was pointed out by appellant's President and General Manager, who testified that it is impractical to have two toll boards at Rochester and that it is more economical to make use of the toll board which the New York Company maintains at Rochester for calls originating and terminating beyond the territory of appellant (R. 174, 175, 194, 195, 196). An engineer, who gave the only testimony offered by the Commission, denied neither the as-

sertion of impracticality nor the claim of economy, but confined himself merely to stating (upon very limited experience) that he knew of no parallel situation in the telephone industry (R. 245–251). Moreover, he conceded that appellant is in a class by itself (R. 251). Appellant was not prepared with statistics relating to this toll board situation (which was raised by the Commission at the hearing on cross-examination) and requested leave to present additional evidence on this issue (R. 426). The Commission did not comply with this request because it stated that, since the point was too minor to affect its conclusion on control, additional evidence would be of no consequence (R. 427).

Contractual Arrangements: Both the Commission and the Court below referred to certain contractual relations between appellant and New York Telephone Company as factors bearing on the issue of control (R. 429, 437). There are three contractual relationships between appellant and New York Telephone Company.

The first of these is a traffic agreement which became effective January 1, 1929 and provides for the establishment of physical connection of the lines of both Companies and the interchange of telephone communications between the two systems. It covers the division of charges made for long distance telephone calls which are transmitted by use of the joint facilities of both Companies (R. 254–283). This traffic agreement is the standard agreement used between New York Telephone Company and connecting companies (R. 196).

The second contract is a facilities agreement dated January 1, 1923 covering the interchange of pin rental, wire rental, joint pole lines, conduit rental and rental of various

types of plant and equipment (R. 284–295). In short, this agreement provides for situations where both Companies require joint facilities in the territory of appellant and in such cases, to avoid duplication, one of the parties furnishes the facilities in accordance with the terms of said agreement. It is this agreement (R. 293) which covers the payments made by appellant to the New York Company for the service of its toll board in switching intra-territorial toll calls at Rochester. Appellant's use of the New York Company's toll board has just been discussed above (page 40, *supra*).

The third agreement between appellant and New York Telephone Company is a lease by the terms of which appellant leases certain space in the building where appellant's main telephone exchange at Rochester is located to the New York Company. This is the building at which the New York Company's toll board is located (R. 198, 410, 410B).

It is submitted that these contractual arrangements in no way indicate control of appellant by New York Telephone Company. Concededly, appellant maintains physical connections with the lines of the New York Company (R. 1, 135). Naturally, some sort of an agreement for division of charges is necessary, and the record shows that the traffic agreement is the standard contract which the New York Company enters into with all of its connecting carriers (R. 196, 198). The facilities agreement covering the joint use of poles, wires, etc., obviously makes for both efficiency and economy and is a matter of common practice not only of telephone utility companies but of gas and electric companies.

Appellant's President. The fact that the man who is

now President and General Manager of appellant once (prior to 1920) was connected with a telephone company, in which the New York Company had a stock interest or possibly even control, was brought out by the Commission at the hearing for the apparent purpose of suggesting that this might have a bearing on the issue of control (R. 116, 139). Neither the Commission in its Report, nor the Court below in its Opinion, made any mention of this fact. It is a matter of common knowledge that it is very difficult to find an experienced telephone man who has not, at some time or another, been connected with the "Bell" system. It may also be pointed out in this connection, that at the time appellant commenced business in 1921, its President was an "independent" man who was also an executive of the old "independent" Rochester Telephone Company (R. 38, 41, 116). Further, the present Vice-President and Chief Engineer of appellant, who testified at the hearings before the Commission, is also a former executive of the old "independent" Rochester Telephone Company (R. 225). In short, any inference that might be drawn from this feature of the record is too weak to warrant consideration.

Radio Wire Facilities: Some point was made at the hearing before the Commission that the furnishing of wire facilities by appellant to two Rochester radio broadcasting companies (in no way connected with New York Telephone Company) might have a bearing on control. The record shows that these facilities furnished by appellant consist simply of the leasing of "dead" circuits (or pairs of wires) to connect the studios and transmitters of these companies, and also to connect the studios with certain "spot" locations (R. 224–227). The current for these

"dead" wires is not supplied by appellant. It seems quite obvious that this feature of appellant's business could not have any bearing on the question of whether it is controlled by New York Telephone Company, and this the Commission conceded in its Report (R. 429).

RÉSUMÉ OF POINT II

Under Point II above we have considered the term "control" as the same was intended to be used by Congress in the statute in question. We have sought to analyze the term in both its "legal" and "actual" aspects and to test its applicability to appellant in the light of the facts disclosed by the record. We submit that the Commission and the District Court (which adopted the Commission's Report without independent determination) departed from applicable rules of law in applying the term "control" to appellant. We submit further that the record reveals irresistably that the New York Company does not control or have the power to control, appellant and that it has never even attempted to exercise control over appellant in any manner whatsoever. The contrary conclusion of the Commission is not founded on substantial evidence and was in fact made in the face of overwhelming such evidence to the contrary. Appellant is here entitled to judicial review.

Interstate Commerce Commission v. Ill. Cent. R. Co., supra, (p. 470);
Interstate Commerce Commission v. Union P. R. Co., supra, (pp. 547, 548);

Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 91;
St. Joseph Stock Yards v. The United States, *supra*, (p. 51).

An analysis of the Commission's Report, which was adopted by the Court below in its Opinion, compels the conclusion that appellant's claim of exemption was approached not only with suspicion but with preconceived intent to deny the exemption. Apparently convinced that the New York Company intended to control appellant from the time of its organization, the Commission overlooked the fact that whatever the intentions of the New York Company were, or are, the fact is that such control has never been obtained or exercised.

III

THE DISTRICT COURT SHOULD HAVE ENJOINED THE ORDER OF THE COMMISSION AND THE DECREE BELOW SHOULD, THEREFORE, BE REVERSED.

Respectfully submitted,
T. Carl Nixon,
Counsel for Appellant.

Justin J. Doyle,
Of Counsel.